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In The

Supreme Court of the United States

October Term, 1994

REDWOOD VILLAGE PARTNERSHIP,
an Illinois Partnership,

Petitioner,

v.

JOHN GRAHAM, BLAINE NORDWELL, ROBERT WANNER, BARB HOWE, DON JOHNSON, AND CHARLES ERHHARDT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Are executive officials engaged in administrative rule-making and rate-setting entitled to the absolute immunity from suits for money damages accorded to legislators?

II.

If executive officials engaged in administrative rule-making and rate-setting are accorded absolute immunity, should such immunity apply to rules that intentionally have a particularized impact and affect only one entity?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Redwood Village Partnership, an Illinois Partnership, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case entered on June 9, 1994.

OPINION BELOW

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioner's lawsuit on

the grounds that defendants were entitled to absolute immunity. A copy of the court's decision is attached in the Appendix to the Petition at pp. 1-9. A copy of the district court's decision dismissing the lawsuit on absolute immunity grounds is attached in the Appendix to the Petition at pp. 10-19.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioner's lawsuit on June 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend XIV:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This suit seeks money damages from executive officials who adopted administrative rules and rates that in their retroactive effect were applicable only to the petitioner, Redwood Village Partnership (hereafter, "Redwood"). Redwood operated a basic care nursing facility in North Dakota. After Redwood successfully challenged the rates imposed on it in the North Dakota Supreme Court, respondent government officials adopted new rules with retroactive effect which applied solely to Redwood. These new rules made it economically impossible for Redwood to continue operating the facility and consequently it was sold at a significant loss. Petitioner contends that the enactment of these rules with particularized retroactive effect solely on Redwood violates the guarantees of due process and equal protection found in the Fourteenth Amendment to the United States Constitution.

Redwood Village, Inc. was a basic care facility located in Wilton, North Dakota. The facility was sold to the Redwood Village Partnership, Ltd., on December 31, 1984. (App. at 2). The partnership was formed solely for the purchase of this basic care facility. After obtaining the facility, Redwood applied for reimbursement of supplemental security benefits from the State for the period

from July 1, 1985 through June 30, 1986. In seeking reimbursement, Redwood used its actual cost of purchasing the facility to determine the rate at which it should be reimbursed. Under this approach, Redwood determined its allowable costs to be $383,649 and requested reimbursement at a rate of $687 per month per eligible resident.

The Department of Human Services (hereafter, "Department") disagreed and concluded that in determining reimbursement rates the standard should be what a "prudent and cost conscious buyer" would have paid for the facility and not the actual cost. (App. at 3). The Department set the allowable costs at $316,968, which resulted in a reimbursement rate of $607 per month per eligible resident.

Redwood requested and received an administrative hearing. The hearing officer agreed with Redwood that under the Department's rules, reimbursement should be based upon the actual purchase price rather than what the prudent and cost conscious buyer would have paid. The Department, however, rejected the hearing officer's conclusion and adopted the "prudent and cost conscious buyer" standard and allowed the $607 reimbursement rate. (App. at 3-4).

Redwood appealed to the North Dakota District Court and the District Court ruled in favor of Redwood. The District Court's findings were essentially the same as the hearing officer's conclusions and the court concluded that the Department's findings were not supported by a preponderance of the evidence and remanded the matter

to the Department. The Department appealed to the Supreme Court of North Dakota.

The North Dakota Supreme Court ruled in favor of Redwood and allowed it a reimbursement rate of $685, almost exactly what it initially requested. *Redwood Village v. North Dakota Department of Human Services*, 420 N.W.2d 333 (N.D. 1988). The Supreme Court concluded that although the Department could have found the cost of purchase to be only $530,000, rather than the $722,000 actually paid by Redwood, the Department had miscalculated the allowable interest cost that could be considered in determining the reimbursement rate. Specifically, the Court found that the allowable interest cost was $502,000, not the $230,800 asserted by the Department, thus justifying the higher reimbursement rate.

Following the North Dakota Supreme Court's decision, the Department promulgated new rules regarding the reimbursement rates to be paid to basic care facilities. These rules, in large part, were motivated by a desire to overturn the North Dakota Supreme Court's ruling in favor of Redwood. Three of these regulations are the source of the action brought by Redwood against the respondents.

Section 75-02-07-04 of the North Dakota Administrative code, which addresses depreciation, specifies that as to the purchase of a facility and its depreciable assets as an ongoing operation, the allowable depreciation on sales on or after July 18, 1984, would be determined by the seller's cost basis less accumulated depreciation plus recaptured depreciation. Although the regulation was

adopted on July 1, 1989, it was made retroactive to facilities purchased after July 18, 1984. (App. at 3-4). Only one basic care facility was sold during this period between 1984 and 1989: Redwood. It is this particularized retroactive effect that Redwood is challenging. Redwood is treated differently from all others who owned facilities between 1984 and 1989. All others use their own cost basis in calculating depreciation; Redwood, alone, had to use the cost basis of the previous owners.

The second regulation at issue is section 75-02-07-04(8), which provides that if an operator sells an asset, or removes it from service, any depreciation costs asserted after June 1, 1984, may be recaptured to the extent the sale exceeds the underappreciated value. Although the regulation was not adopted until 1989, it was made retroactive to 1984. (App. at 3-4). Only one facility would have to pay back all of the depreciation costs it had previously asserted if it was sold after July 1, 1989: Redwood Village. In fact, no other basic care facility in North Dakota had been sold in the past 25 years. Most, if not all, of the facilities in the State already had fully depreciated their major assets and would not be affected by the regulations. Even if some were still depreciating assets, most of the depreciation would have been asserted before June 1, 1984, and would not be subject to recapture. Redwood Village clearly suffered the most from the regulation.

The third regulation specifically was intended to overturn the North Dakota Supreme Court's decision in favor of Redwood. Regulation 75-02-07-05(1)(a)(7) stated that the allowable interest on facilities bought on or after

July 18, 1984, is limited to the interest cost the facility would have reported had it not changed ownership. (App. at 3-4). The regulation thus retroactively changed Redwood's allowable interest costs.

The result of these regulations would have been a change from a positive cash flow of $3,500 per month to a negative cash flow of the same amount. In order to avoid this effect, Redwood sold the facility back to the previous owners at a significant loss before the effective date of the regulations. Indeed, if Redwood had waited before selling the facility it would have had to pay the recaptured depreciation if it later changed the use of the facility, closed it, or sold it.

Redwood then brought this lawsuit to recover for the violation of its constitutional rights, pursuant to 42 U.S.C. § 1983. The action was brought against the named defendants in their individual capacity as they were all employees of the Department of Human Services and were involved in the promulgation of the regulations.

The United States District Court, on April 27, 1993, dismissed the lawsuit on the grounds that the defendants are entitled to absolute immunity. On June 9, 1994, the United States Court of Appeals agreed and concluded that defendant's were protected by absolute immunity.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve a Split Among the Circuits Concerning Whether Executive Officials Engaged in Rule-Making and Rate-Setting Are Entitled to Absolute Immunity

A. A Conflict Among the Circuits Exists

There is a conflict among the circuits as to whether executive officials engaged in rule-making and rate-setting should be protected by the qualified immunity usually accorded to executive officials or whether they should be granted the absolute immunity provided to legislators. The United States Court of Appeals for the Fifth Circuit, in *Walter v. Torres*, 917 F.2d 1379 (5th Cir. 1990), held that parole board officials engaged in rule-making were performing an administrative task and therefore could not invoke absolute immunity. The court noted that the challenged activity of the parole board was directed at its "exercising a broad statutory rule making authority regarding the parole process." 917 F.2d at 1383. The court concluded: "[W]e reverse the district court's holding that the defendants were entitled to absolute immunity as to the function of rule making. Defendants in their administrative capacity possessed, instead, qualified immunity protecting them from personal liability." 917 F.2d at 1384.

In contrast, the United States Court of Appeals for the District of Columbia Circuit, in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983), held that agency officials engaged in rule-making are performing a legislative task and should be accorded absolute immunity. *Jayvee Brand* involved a suit against members of the

Consumer Products Safety Commission for losses suffered as a result of a rule banning certain substances from being used in making children's sleepwear. The court concluded that the suit was directed at the defendants' rule-making and that "when an agency exercises quasi-legislative regulatory authority, action for money damages against agency members will not lie." 721 F.2d at 395.

In this case, the United States Court of Appeals for the Eighth Circuit expressly recognized this conflict between the circuits. The court acknowledged the Fifth Circuit's decision in *Walter v. Torres*, but declared that "[w]e agree instead with the reasoning of the District of Columbia Circuit in *Jayvee Brand, Inc. v. United States*." App. at 7 (citation omitted).

Thus, there is a direct conflict among the circuits. The United States Court of Appeals for the Fifth Circuit has held that rule-making is an administrative task and executive officials engaged in rule-making should not be accorded absolute, but rather, qualified immunity. The United States Courts of Appeals for the District of Columbia and for the Eighth Circuits have held that such executive officials should be granted absolute immunity. This Court should grant certiorari to resolve the conflict among the circuits.

B. Executive Officials Engaged in Administrative Rule-Making and Rate-Setting Should Not Be Accorded Absolute Immunity

All of the respondents in this lawsuit were part of the executive branch of the North Dakota government.

Defendant John Graham was the Director of the North Dakota Department of Human Services. Defendant Blaine Nordwall was an Assistant Attorney General working within the Department. The remaining defendants were employees of the Department.

It is firmly established that executive officials generally receive only qualified immunity, not absolute immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Procunier v. Navarette*, 434 U.S. 555 (1978). The Supreme Court recently declared that "[q]ualified immunity 'represents the norm' for executive officials." *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993).

Indeed, absolute immunity is the exception to the general rule that government officials are liable if they do not act in good faith. Only a relatively few officials possess absolute immunity – judges acting in a judicial capacity, *Stump v. Sparkman*, 435 U.S. 349 (1978); prosecutors acting in a prosecutorial capacity, *Burns v. Reed*, 111 S.Ct. 1934 (1991); legislators acting in a legislative capacity, *Tenney v. Brandhove*, 341 U.S. 367 (1951); and the President of the United States when discharging the duties of the office, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The Supreme Court has taken a functional approach to absolute immunity, applying absolute immunity to the function performed and not the office. *See, e.g., Buckley v. Fitzsimmons*, 113 S.Ct. at 2613; *Forrester v. White*, 484 U.S. 219, 224 (1987); *Ray v. Pickett*, 734 F.2d 370 (8th Cir. 1984). But this Court has "emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. The

presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. 2167, 2169-70 n.4 (1993), quoting *Burns v. Reed*, 111 S.Ct. 1934, 1939 (1991). Because absolute immunity has such harsh consequences, the Court has "been quite sparing in [the] recognition of absolute immunity, and ha[s] refused to extend it any further than its justification would warrant." *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170 n.4, quoting *Burns v. Reed*, 111 S.Ct. at 1939.

In its most recent decision considering the choice between absolute and qualified immunity, the Supreme Court explained that absolute immunity only is available for those functions that would have been immune in 1871 when Congress enacted § 1983. *Buckley v. Fitzsimmons*, 113 S.Ct. at 2613. The Court stated that "[e]ven when we can identify a common-law tradition of absolute immunity for a given function, we have considered whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 cases." *Id.*

The Eighth Circuit's opinion dramatically expands the scope of absolute immunity. The Eighth Circuit would accord all executive and administrative officials, at all levels of government, absolute immunity if they are engaged in rate-setting or rule-making. Such a radical increase in absolute immunity is inconsistent with the Supreme Court's command that courts be "quite sparing" in recognizing absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170 n.4 (citations omitted). Moreover, as discussed below, neither history nor policy justifies according absolute immunity to executive officials engaged in rate-setting and rule-making. This case

presents the Court with an opportunity to clarify whether the classic administrative tasks of rule-making and rate-setting should be treated as executive or legislative in nature when there is a suit for money damages.

1. Administrative rule-making and rate-setting are historically executive tasks

The Supreme Court has emphasized an historical approach to immunity issues focusing on the "immunity historically accorded the relevant official at common law." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Burns v. Reed*, 111 S.Ct. 1934, 1939 (1991). Only those officials that were protected by absolute immunity at common law, as of 1871 when § 1983 was adopted, are entitled to claim absolute immunity today. *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170.

Neither the court of appeals nor the respondents in their briefs in the lower courts point to a single case where executive officials engaged in rule-making and rate-setting were accorded absolute immunity at common law. Quite the contrary, these are classic executive tasks and therefore are protected only by qualified immunity.

Rate-setting and rule-making, the challenged activities of the defendants, long have been tasks performed by the executive branch of government. Regulatory agencies since their inception have engaged in these tasks.

Virtually all administrative agencies, at both the federal and state level, promulgate rules. This authority is

recognized in statutes. For example, the Federal Administrative Procedures Act – the federal law controlling executive agencies – sets out procedures for rule-making. *See* 5 U.S.C. § 553. A leading Administrative Law casebook states: "Many administrative agencies are empowered to decide particular cases through adjudication and also to engage in rulemaking." S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 399 (1979). It is estimated that "at least 58 agencies at the federal level have some form of rule making authority and issue about 7,000 rules and policy statements annually." F. Heffron, *The Administrative Regulatory Process* 1 (1983).

Although rule-making shares characteristics with legislating, it is a traditional executive activity. *See* F. Heffron, *id.* at 226 ("Rule making [is] the distinctive administrative process.") Therefore, officials engaged in rule-making should be accorded qualified immunity, not absolute immunity.

Likewise, rate-setting is a core executive function protected by qualified, not absolute immunity. The very first Congress authorized the President of the United States to appoint an administrative official to "estimate the duties payable on imports." F. Heffron, *supra*, at 1. Executive agencies at both the federal and state level long have engaged in rate-setting and courts have accorded only qualified immunity to officials engaged in this executive task.

This case thus offers the Court the opportunity to clarify how lower courts should treat traditional executive tasks that have similar effects to legislation. Although administratively adopted rules and rates have

the force of law, enacting them is as much a classic executive function as adopting legislation is a classic function of legislatures.

Neither of the Supreme Court cases relied upon by respondents below decide this issue or support extending absolute immunity to executive officials engaged in administrative rule-making and rate-setting. *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), was a suit against individuals who the Supreme Court labelled "regional legislators." 440 U.S. at 405. The case involved a suit against an inter-state regional planning agency that had adopted a land use ordinance. The agency possessed and exercised the legislative power to make laws for areas within its jurisdiction. The Supreme Court's holding was that legislative absolute immunity "is equally applicable to federal, state, and local regional legislators." 440 U.S. at 405. The Court concluded its opinion by declaring: "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406.

In contrast, no one reasonably would refer to the defendants in this case as legislators. They were, at all times, executive officials. At no time were they acting in a capacity comparable to that of a state legislature. *Lake County Estates* simply did not involve executive officials in a state government who were engaged in rule-making and rate-setting. Rather, *Lake County Estates* involved a unique legislative body, a regional compact, specifically endowed with regional legislative powers.

The other case cited by respondents below, and also invoked by the court of appeals, was *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). There the Court held that the members of the State Supreme Court had absolute immunity in promulgating the State's Code of Professional Responsibility. The Supreme Court emphasized that absolute immunity existed because the State Supreme Court Justices exercised the State's *entire* legislative power in an area. *See also* 2 S. Nahmod, *Civil Rights and Civil Liberties Litigation* 96 (3d ed. 1991) ("*Consumers Union* indicated the following: State legislators and judges who exercise a state's entire legislative authority over a subject are absolutely immune from § 1983 actions.") The defendants in this case, of course, did not exercise North Dakota's entire legislative authority in this area. Also, *Consumers Union* involved the immunity of *judges* acting in a legislative capacity, not executive officials. This distinction is crucial because judges generally are protected by absolute immunity, while executive officials generally receive only qualified immunity. *See Stump v. Sparkman*, 435 U.S. 349 (1978).

Neither *Lake County Estates* nor *Consumers Union* involved according absolute immunity to executive officials engaged in the type of rule-making and rate-setting that defendants are being sued for here. Nor is there common law authority according absolute immunity to such executive tasks. Quite the contrary, because rule-making and rate-setting are classic administrative functions, qualified immunity is the appropriate standard. This case thus offers the Court the opportunity to clarify the circumstances under which executive officials should

be regarded as performing a legislative function and thereby protected by absolute legislative immunity.

2. History and policy do not support extending legislative absolute immunity to executive officials engaged in administrative rule-making and rate-setting

In determining the nature of the immunities to be accorded to specific individuals, the Court says it looks to "the immunity historically accorded the relevant official at common law and the interests behind it." *Antoine v. Byers & Anderson, Inc.*, 113 S.Ct. at 2170, quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978). An examination of the historical purposes of legislative immunity shows that it is unwarranted to extend it to executive officials engaged in administrative rule-making and rate-setting.

Chief Justice Earl Warren explained that legislative immunity traces its origins to the 17th century and a struggle between the Parliament and the Crown. *Barr v. Mateo*, 360 U.S. 564, 579 (1959). Members of Parliament claimed that their legislative activity should not be the basis for arrests or civil suits. The Bill of Rights which followed the Revolution of 1688 embodied this privilege in its declaration "[t]hat the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." W. and M. 2, c.2 (1689). This provision, of course, was the inspiration for the "Speech and Debate Clause" found in Article I, section 6 of the United States Constitution.

In *Tenney v. Brendhove*, 341 U.S. 367 (1951) – the seminal case recognizing absolute legislative immunity to § 1983 liability – the Court derived legislative immunity from the protection provided legislators in the Speech and Debate Clause of the Constitution. In *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967), the Court expressly declared: "the doctrine of legislative immunity, having its root as it does in the speech and debate clause of the Constitution."

The speech and debate clause, and analogous provisions in state constitutions, applies to legislative bodies – even to regional legislative bodies such as in *Lake County Estates*. But there is no historical basis for extending its protection to executive branch officials.

The speech and debate clause functionally serves to advance separation of powers by protecting legislative functions from executive and judicial intrusions. The Supreme Court explained: "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. . . . The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for insuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 178-79 (1975).

The Court of Appeals overlooks a key distinction between legislators and administrative officials. Legislators are reviewed through the electoral process. But administrative officials are generally insulated from direct political accountability. Judicial review of the latter

is therefore essential in light of the absence of a direct political check.

The need for *legislative* independence does not justify absolute immunity for executive officials. Whereas absolute immunity is the standard for legislators, qualified immunity is the "norm for executive officials." *Buckley v. Fitzsimmons*, 113 S.Ct. at 2613. Executive rule-making and rate-making is traditionally subject to judicial review. There is no historical or functional basis for according absolute immunity to such executive conduct.

3. It would be a dramatic, unjustified expansion of absolute immunity to accord it to all executive officials engaged in administrative rule-making and rate-setting

The Court of Appeal's holding is a radical expansion of absolute immunity. The court accords absolute immunity to all executive officials engaged in rule-making or rate-setting. Such an expansion is fundamentally at odds with the Supreme Court's repeated statement that courts should be "quite sparing" in according absolute immunity. *Buckley v. Fitzsimmons*, 113 S.Ct. at 2613; *Burns v. Reed*, 111 S.Ct. at 1939; *Tower v. Glover*, 467 U.S. 914, 920 (1984).

Absolute immunity places the actions of government officials – no matter how illegal or even malicious – unreviewable. This is contrary to § 1983's objectives of compensating injured individuals and deterring wrongful conduct. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (articulating the goals of § 1983). According defendants absolute immunity in this lawsuit is an

unjustified expansion of absolute immunity to executive officials and is counter to § 1983's underlying objectives.

The breadth of the Court of Appeal's holding is evidenced by the consequences of according legislative immunity to all executive officials engaged in rule-making or rate-setting. Legislators, unlike any other officials accorded absolute immunity, have immunity to suits for injunctive relief. *Supreme Court of Virginia v. Virginia Consumers Union*, 446 U.S. at 733. According absolute legislative immunity to executive officials engaged in rule-making or rate-setting is that they could not be named as defendants in suits for injunctive or declaratory relief when their actions were unconstitutional or otherwise illegal. Because the state government and its agencies cannot be named as defendants due to the Eleventh Amendment, the effect of the district court's ruling often would be to immunize agency rules and rates from judicial review.

The Court of Appeals decision would accord defendants absolute legislative immunity to suits for money damages, but not grant them absolute legislative immunity to suits for injunctive or declaratory relief. (App. at 8). No precedent exists for treating the identical act and function as legislative if one remedy is sought, but administrative if another remedy is sought.

Thus, this case presents an opportunity for the Court to clarify the circumstances under which executive officials engaging in the common and traditional administrative functions of rule-making and rate-setting are protected by absolute legislative immunity.

II. This Court Should Decide the Important Question as to Whether Rules With a Particularized Impact Should Be Regarded As Legislative

Even if the above analysis were incorrect and rule-making by executive officials is generally to be regarded as legislative in nature, the rules at issue in this litigation were particularized in their impact and therefore should not be protected by absolute immunity. This Court never has addressed whether absolute legislative immunity should be accorded to rules that are intentionally particularized in their scope and effect. This case presents the Court with an opportunity to clarify the important issue as to the scope of absolute legislative immunity.

Courts of appeals throughout the country have ruled that even legislators are not deemed to act in a legislative capacity when they promulgate regulations with specific, rather than general impact.

For example, in *O'Brien v. City of Greers Ferry*, 873 F.2d 1115 (8th Cir. 1989), the court found that members of a city council could not claim absolute immunity for their failure to provide compensation to an alderman who had requested reimbursement for legal fees incurred in defending a defamation action. The court emphasized that a particularized determination is not protected by legislative immunity, even when the decision is made by legislators.

Similarly, in *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984), the court held that members of a town planning board were entitled only to qualified immunity for the conditions that they imposed on development of the

plaintiff's subdivision. The court explained that an action that "single[s] out specifiable individuals and affect[s] them differently from others" is administrative and not legislative.

In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), members of a city council were deemed to have only qualified immunity for their decision to withhold the issuance of a building permit to plaintiff builder. The court explained that their decision was executive in nature because it "neither applied to the general community, nor involved the promulgation of legislative policy as a defined and binding rule of conduct. Rather it was directed specifically and solely at a single individual." 857 F.2d at 1304.

These decisions are in accord with a large body of authority holding that actions directed at specific individuals, even when taken by legislative bodies, are executive and not legislative in nature. *See, e.g., Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992); *Hughes v. Tarrant County, Texas*, 948 F.2d 918 (5th Cir. 1991); *Cinevision Corporation v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

In this case, the actions of the defendants applied only to Redwood Village. The regulations were drafted specifically to reverse the North Dakota Supreme Court's decision concerning Redwood Village. *Redwood Village v. North Dakota Department of Human Services*, 420 N.W.2d 333 (N.D. 1988). The regulation concerning allowable interest, § 75-02-07-04(7), was adopted with the specific purpose of overturning this decision and adversely affecting Redwood Village.

The regulation concerning recapture of depreciation went into effect July 1, 1989 and applied to sales after June 1, 1984. N.D.A.C. § 75-02-07-04(8). One, and only one, facility was covered by the retroactive effect of this regulation: Redwood Village.

Likewise, the regulation determining the depreciation on sales, N.D.A.C. § 75-07-04(7), applied only to facilities bought between June 1, 1984 and July 1989. Again, the only facility affected by the regulation was Redwood Village.

Because the retroactive effect of the regulations was so particularized in their actual and intended effect, they should not be regarded as legislative in nature. Accordingly, absolute immunity is inappropriate. This case presents the opportunity for this Court to clarify the important issue as to whether absolute legislative immunity applies to actions that are not general in scope, but are intentionally particularized to a specific person or entity.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2413

Redwood Village Partnership, an Illinois Partnership;

Appellant;

v.

John Graham; Blaine Nordwall; Robert Wanner; Barb Howe; Don Johnson; Charles Ehrhardt, in their individual capacity;

Appellees.

No. 93-2495

Redwood Village Partnership, an Illinois Partnership;

Appellee;

v.

John Graham; Blaine Nordwall; Robert Wanner; Barb Howe; Don Johnson; Charles Ehrhardt, in their individual capacity;

Appellants.

Appeals from the United States District Court for the District of North Dakota.

Submitted: March 17, 1994
Filed: June 9, 1994

Before HANSEN, Circuit Judge, and HEANEY and JOHN R. GIBSON, Senior Circuit Judges.

HEANEY, Senior Circuit Judge.

Redwood Village Partnership, owner of a basic care facility, brought this action for money damages under 42 U.S.C. § 1983 against six employees of the North Dakota Department of Human Services,[1] alleging that their promulgation of administrative regulations violated the partnership's rights under the Constitution. The district court granted summary judgment for the state employees on the ground of absolute immunity. We affirm.

I.

Redwood Village, Inc., was a state-licensed, basic care facility located in Wilton, North Dakota, and owned by Mr. and Mrs. John Hruby. In 1984 the Hrubys sold the facility to Redwood Village Partnership ("Redwood"), an Illinois limited partnership which was created for the purpose of buying the facility. Redwood's two general partners were the facility's accountant, who lived in

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[1] John Graham was executive director of the Department, Blaine Nordwall was an assistant attorney general serving as chief legal counsel for the Department, and Robert Wanner, Barb Howe, Don Johnson, and Charles Ehrhardt were Department employees.

Bismarck, North Dakota, and an Illinois attorney. The Hrubys continued to manage the facility after the sale.

This controversy arose from a disagreement between Redwood and the North Dakota Department of Human Services over the state's rate of reimbursement for the care of residents receiving public assistance. These "public pay" residents constituted the majority of the facility's residents. Shortly after buying the facility, the partnership applied to the Department for reimbursement for the period from July 1, 1985, through June 30, 1986. The reimbursement rate is based on a facility's allowable costs, including depreciation and interest costs. *See* N.D. Admin. Code Ch. 75-02-07. Redwood requested a rate of reimbursement based on the purchase price of the facility. The Department, however, determined that the rate should be based on what a prudent and cost-conscious buyer would have paid rather than the actual purchase price. The Supreme Court of North Dakota ultimately resolved the issue, holding that the Department's calculation of depreciation was appropriate but that it misapplied its regulations concerning allowable interest costs. *Redwood Village Partnership, Ltd. v. North Dakota Dep't of Human Servs.*, 420 N.W.2d 333, 339 (N.D. 1988). The court remanded the case to the Department for recalculation of the reimbursement rate for the Redwood Village facility for the 1985-86 fiscal year.

Redwood continued to receive reimbursements according to the supreme court's interpretation of the regulations until the Department proposed new reimbursement rules for basic care facilities through a formal rulemaking process. The proposed rules, with an effective date of July 1, 1989, were largely patterned on existing

rules for long-term care facilities. *See* Preamble for Proposed Amendments to N.D. Admin. Code Ch. 75-02-07, Joint Appendix at 204. Redwood submitted written objections in November 1988 during the comment period of the rulemaking process. After adoption of the rules, however, Redwood did not seek judicial review of the rule changes to challenge their legality. Instead, Redwood sold the facility back to the Hrubys on June 30, 1989, allegedly at a loss, just before the effective date of the new rules. Thereafter Redwood brought this action for money damages against six Department officials involved in promulgating the rules.

II.

Redwood's complaint alleged that three of the new regulations were adopted specifically to apply retroactively to Redwood alone in order to circumvent the decision of the North Dakota Supreme Court. Those rules concerned the treatment of interest and depreciation expenses when calculating the reimbursement rate for "public pay" residents, and recapture of depreciation upon sale of the facility. *See* N.D. Admin. Code §§ 75-02-07-04(7), 75-02-07-04(8), 75-02-07-05(7). The partnership claimed that the arbitrary retroactive rulemaking violated its Fourteenth Amendment rights to due process and equal protection, the takings clause of the Fifth Amendment, and the privileges and immunities clause of article IV, section 2 of the Constitution. Redwood asserted that the executive officials were entitled to only qualified, not absolute, immunity for their administrative rulemaking.

The sole issue we are called upon to decide is whether the Department officials are absolutely immune from federal damages claims for their promulgation of rules. The only conduct complained of is the rulemaking itself; there was no application or enforcement of the rules against Redwood because it sold its basic care facility before the amended rules came into effect. We review de novo the district court's determination that the Department officials were absolutely immune from liability for damages. *See Brown v. Griesenauer*, 970 F.2d 431, 434 (8th Cir. 1992).

The Supreme Court has adopted a functional approach to questions of immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982). "Absolute immunity flows not from rank or title or 'location within the Government' but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Butz v. Economou*, 438 U.S. 478, 511 (1978)). The critical inquiry is the nature of the official's function a particular proceeding, not the identity of the actor who performed the function. *See Forrester v. White*, 484 U.S. 219, 229 (1988); *Brown*, 970 F.2d at 436. The nature of a proceeding, in turn, "depends not upon the character of the body but upon the character of the proceedings." *Brown*, 970 F.2d at 436 (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983) (citation omitted)).

The rulemaking undertaken by the Department officials was legislative in nature. Legislation "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Brown*, 970 F.2d at 437 (quoting

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)). The three rules that Redwood specifically complained of apply by their terms to all basic care facilities. During the rulemaking comment period, the proposed rules elicited responses from several basic care facilities, including Redwood Village, concerning the impact of the proposed rules on their operations. The new reimbursement rate formula applied only to payments made beginning with the 1989 fiscal year. While the challenged regulations do have an element of retroactivity in that they use June 1, 1984, as a baseline date when calculating the basis for depreciation and interest expenses and determining depreciation costs that are subject to recapture if the facility is later sold at a price exceeding the undepreciated value, these regulations apply generally to any facility that is sold after the effective date of the regulations.

Redwood urges us to adopt the language and holding of the Fifth Circuit in *Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir. 1990), which concluded that a parole board's enactment of rules was an "administrative" function which entitled the board members only to qualified immunity. The characterization of rulemaking as "administrative" does not assist us in analyzing the immunity question under a functional approach, however. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) (state supreme court's enactment of state bar disciplinary code was act of "rulemaking" performed in "legislative" capacity). Nor is this characterization bolstered by Redwood's statements that the Department's new rules in essence govern ratesetting, and ratesetting is a classic executive function. *See Prentis*, 211 U.S. at 226

("The establishment of a rate [by the Virginia State Corporation Commission] is the making of a rule for the future, and therefore is an act legislative" in nature.) We agree instead with the reasoning of the District of Columbia Circuit in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983), which considered a damages claim against five former members of the Consumer Product Safety Commission. Noting that "[l]egislation is a function entitled to absolute immunity, with the immunity following the function and not the office," the court stated that "it is clear that when an agency exercises quasi-legislative regulatory authority, action for money damages against agency members will not lie." *Id.* at 395 (citations omitted). We likewise hold that the Department officials who promulgated the amended rules for basic care facilities are absolutely immune from suit for damages.

Redwood contends that a major reason to reject absolute immunity from damages liability here is that according "legislative" immunity to executive officials for their rulemaking would also bar any action for declaratory or injunctive relief. The partnership cites *Consumers Union* to support this proposition. We disagree with Redwood's reading of that case. When discussing *Consumers Union* in its *Forrester* decision, the Supreme Court clearly limited the concept of "legislative" immunity to the rulemaking act itself:

> In explaining why legislative, rather than judicial, immunity furnished the appropriate standard, we said: "Although it is clear that under Virginia law the issuance of the Bar Code was a

> proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking." (Citation omitted.) Similarly, in the same case, we held that judges acting to enforce the Bar Code would be treated like prosecutors, and thus would be amenable to suit for injunctive and declaratory relief. (Citation omitted.) Once again, it was the nature of the function performed, not the identity of the actor who performed it, that informed our immunity analysis.

Forrester, 484 U.S. at 228-29. The absolute immunity we confer upon the Department officials is for their conduct of rulemaking. Suits for declaratory and injunctive relief are still available to challenge regulations.

We recognize the tension between the "interest in having governmental officials exercise their judgment free of the fear of burdensome litigation" and the "interest in checking improper official conduct and in providing wronged individuals with adequate remedies for their injuries." *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607, 712 (8th Cir. 1980). The threat of damages liability not only encourages officials to carry out their duties in a lawful manner, but also "can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester,* 484 U.S. at 223. We conclude that exposure to liability for monetary damages would unduly inhibit executive officials when carrying out the quasi-legislative act of rulemaking. We therefore hold that executive officials are absolutely immune from suits

for money damages under section 1983 for their promulgation of rules, and we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

REDWOOD VILLAGE PARTNERSHIP an Illinois Partnership,	)	
Plaintiff,	)	Civil No. A1-91-108
-vs-	)	
JOHN GRAHAM, BLAINE NORDWALL ROBERT WANNER, BARB HOWE, DON JOHNSON, and CHARLES EHRHARDT, in their individual capacity,	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Apr. 27, 1993)

Redwood Village Partnership (plaintiff) brought this 42 U.S.C. § 1983 action against John Graham, Blaine Nordwall, Robert Wanner, Barb Howe, Don Johnson, and Charles Ehrhardt (defendants) to recover monetary damages for the alleged violation of plaintiff's civil rights.

Defendants filed a rule 56, Federal Rules of Civil Procedure motion for summary judgment. Thereafter plaintiff filed a motion for summary judgment for the relief pleased in its Complaint. Plaintiff's motion is denied.

Summary Judgment is available to a party when a review of the pleadings and other documents filed indicate there exists no genuine issue of material fact and a

party is entitled to judgment, as a matter of law. Fed. R. Civ. P. 56, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A Court considering a motion for summary judgment must view the evidence in a light most favorable to the non-moving party. The non-moving party is entitled to all reasonable inferences that can be drawn from the evidence. *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989). For purposes of this opinion, the plaintiff will be considered to be the non-moving party.

FACTUAL BACKGROUND

Redwood Village is a partnership organized under the laws of Illinois. The partnership was formed to acquire and operate Redwood Village, a basic care home for the elderly and infirm located in Wilton, North Dakota, which it purchased on December 31, 1984.

The course of events that has culminated in the current law suit has been recited by the North Dakota Supreme Court in *Redwood Village v. N.D.Dept. of Human S.*, 420 N.W.2d 333 (N.D. 1988). Plaintiff, as the owner of Redwood Village was entitled to a per patient reimbursement of allowable operating expenses for public pay residents. The amount of reimbursement was calculated by the North Dakota Department of Human Services.

Reimbursable expenses included an allocation for the recoupment of depreciation and of interest expense incurred by the owner in the acquisition of the facility. The controversy in this case had its genesis in the inability of the parties to agree on the amount of reimbursement for interest expenses and depreciation.

Administrative proceedings were instituted by the plaintiff for the purpose of rectifying what the plaintiff felt was an inequitable reimbursement rate. According to Redwood Village, the practical effect of the culmination of this quest for a proper reimbursement rate was the decision by the North Dakota Supreme Court in favor of Redwood Village.

Redwood Village alleges the response of the North Dakota Department of Human Services to this unfavorable court decision was the promulgation of retroactive administrative rules designed specifically to circumvent the North Dakota Supreme Court decision and to penalize Redwood Village. Defendants in this case were at all times relevant to this controversy, employed by the North Dakota Department of Human Services.

DISCUSSION

Plaintiffs describe the role of each of the defendants in this case as:

> All defendants at all times reference [sic] in this complaint were acting and operating within the scope of their employment and under the authority and color of the laws, statutes and administrative rules of the State of North Dakota. The defendants in their capacities as employees of the Department of Human Services and the State of North Dakota are charged with the responsibility of licensing and regulating the operation of basic care homes for the

> aged and infirm in the State of North Dakota, such as Redwood Village."[1]

Plaintiff's Amended Complaint (Doc. # 21) at 2.

Absolute immunity is a complete shield for defendants sued pursuant to 42 U.S.C. § 1983. Qualified immunity affords defendants immunity from suit if their conduct was objectively reasonable. *See Owen v. City of Independence*, 445 U.S. 622, 637-38 (1980). In this case, defendants seek summary judgment dismissal based on a claim that absolute legislative immunity, or, in the alternative, qualified immunity, shields them from suit. The court has considered the claims of the defendants and the plaintiff's response thereto, and concludes defendants are entitled to summary judgment dismissal based on absolute legislative immunity.

The concept of absolute legislative immunity has long been recognized. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (recognizing the preservation of a legislator's privilege, in both state and federal government, to be free to do and say as they might in the implementation of legislation). The purpose behind it is to afford legislators immunity "from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* at 377. The application of the privilege does not involve consideration of whether the actor had an improper purpose in conducting the legislative function in question. *Id.*

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[1] Defendant Blaine Nordwall was described as being an Assistant Attorney General of the State of North Dakota and the Chief Legal Counsel of the North Dakota Department of Human Services.

In considering whether a particular official or officials are entitled to absolute immunity, the Supreme Court has mandated a "functional approach". *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982). Under this approach, courts must examine "the nature of the functions with which a particular official or class of officials have been lawfully entrusted, and [then] seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1987). "Thus, under the functional approach to immunity law, the critical inquiry is in what capacity the defendants were acting at the time of the allegedly unconstitutional or unlawful conduct." *Brown v. Griensenauer*, 970 F.2d 431, 436 (8th Cir. 1992). Therefore, it does not matter that the actor's office is in the executive, judicial or legislative branch of government; if the act is legislative in nature, absolute immunity may be appropriate. *Id.* The next step in the analysis necessarily requires an evaluation of the capacity in which the defendants were acting when they engaged in the complained of conduct.

The conduct of defendants that plaintiff alleges deprived it of its constitutional rights involved the actions of defendant employees of the North Dakota Department of Human Services in promulgating administrative rules through the formal rule making procedure. The new rules provided that with respect to facilities acquired after July 18, 1984, the State, in setting the reimbursement rate, would consider the basis for depreciation to be the seller's cost of the facility as of July 18,

1984, rather than the purchaser's cost to acquire the facility. A similar rule was promulgated with respect to allowable interest expense. The new rules also enabled the State to recapture the depreciation expense back to June 1, 1984, in the event a facility was sold in the future. The State claims its purpose in promulgating the new rules "was to conform the basic care rules to the existing and more comprehensive rate setting rules for nursing homes." Defendant's Brief in Support of Motion for Summary Judgment (Doc. # 26) at 8. Also cited as a reason for the new rules was the need "to tighten up the existing rules in terms of cost control." *Id.* Thus, from the date the new rules went into effect a change had been made affecting the *future* per-patient rate that facilities transferred after July 18, 1984, were entitled to receive from the State. These new rules affect the *future* per-patient rate of all facilities transferred after July 18, 1984, but did not become effective until July 1, 1989. The transfer of the facility by the plaintiff herein was consummated prior to July 1, 1989.

The North Dakota Department of Human Services is an administrative agency of the executive branch of the state government of North Dakota. *See* N.D.Cent.Code § 28-32-01 (1991) (definitions). Pursuant to N.D.Cent.Code § 28-32-02, the Department is authorized, and required, to establish rules. Pursuant to this section, the Code requires opportunity for public input into the rule making process. *See* N.D.Cent Code § 28-32-02(3) (1991) (agency must conduct oral hearing and make a written record detailing its consideration of any written and oral submissions received). Notice of public hearing, scheduled for November 18, 1988 at the State Capital in

Bismarck, North Dakota, was published in the *Bismarck Tribune, Devils Lake Daily Journal, Dickinson Press, Williston Daily Herald, Grand Forks Herald, Jamestown Sun and the Minot Daily News*. The published notice invited interested members of the public to attend the hearing and discuss the Department's proposed rule changes or, in the alternative, the public was invited to send written comments to the Department. It appears a copy of the proposed rules was sent to the operator of every home for the aged and infirm in the state of North Dakota prior to the meeting. The Department received written comments from nine commentators, two of whom made oral presentations at the public hearing.[2] The Department issued a written statement wherein it outlined the comments it had received and described its reaction to the issues addressed in the comments. The proposed rules were then sent to the Attorney General's office for review. They were approved by the Attorney General and pursuant to the requirements of N.D.Cent.Code § 28-32-03 (1991), the rules were adopted, published in the North Dakota Administrative Code, and given the force and effect of law.

The conduct at question resulted in promulgated revised rules that apply to everybody. *See Griesenauer*, 970 F.2d at 437 ("Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."); *See also Bateson v. Greisse*, 857 F.2d 1300, 1304

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[2] Gregory Cleveland, General Partner of Redwood Village submitted a written response to the proposed rule changes in which he addressed his concerns relating thereto.

(9th Cir. 1988) (describing legislative acts as those which apply to everybody, while acts that apply to a single person or group are categorized as executive). The plaintiff alleges the rules were designed to harm it specifically, but the court notes the rules do not single out the plaintiff or in any way suggest they are to be applied only against the plaintiff. That provisions of the new rules may only have affected plaintiff does not change the nature of the defendants' conduct from legislative to executive. The conduct of the defendants in adopting the new rules is, in the court's view, classically legislative.

The same rationale that traditionally supports the grant of absolute immunity to "legislators" likewise mandates the grant of such immunity to those executive branch individuals who in substance, are performing a legislative function. The conduct of the defendants in formulating the rules in this case is best described as legislative.[3] The purpose behind affording absolute legislative immunity is to ensure that individuals charged with implementing legislation may perform this vital function and be absolved from a threat of retribution in the form of law suits brought by those adversely affected by the rules. The court concludes absolute legislative immunity in this case is consistent with the rationale of

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[3] In *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391 (1978), the Supreme Court granted absolute legislative immunity to a Regional Planning Agency, consisting in part of non-elected individuals appointed jointly by the State of California and Nevada. *Id.* at 406. This court views the instant case and that as existed in *Lake Country* to be similar.

the Supreme court where such immunity has been granted.[4]

IT IS ORDERED:

1) Plaintiff's motion (Doc. # 38) for summary judgment is without merit and is denied. It's complaint is dismissed.

2) Defendant's motion (Doc. # 26) for summary judgment is granted. Judgment shall be entered accordingly.

Dated this 27th day of April, 1993.

/s/ Paul Benson
PAUL BENSON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

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[4] In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), the U. S. Supreme court granted the Virginia Supreme Court absolute legislative immunity for its conduct in promulgating the Virginia Code of Professional Responsibility. The Court noted that had the state legislature enacted the same code, which it could have, that body would likely have prevailed on the basis of absolute legislative immunity. *Id.* at 733-34. In the instant case, the North Dakota State Legislature could have legislated the rules that were promulgated by the Department of Human Services.

The court also notes the situation in this case is similar to that in *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz*, the Court granted absolute judicial immunity to executive branch officials engaged as administrative hearing officers. *Id.* In doing so, the Court stated, "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id.* at 512-13.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

REDWOOD VILLAGE PARTNERSHIP an Illinois Partnership,	)	
Plaintiff,	)	Civil No. A1-91-108
v.	)	
JOHN GRAHAM, BLAINE NORDWALL ROBERT WANNER, BARB HOWE, DON JOHNSON, and CHARLES EHRHARDT, in their individual capacity, Defendants.	)	

JUDGMENT

(Filed Apr. 27, 1993)

Pursuant to the order for judgment entered in the above captioned case this date,

IT IS ADJUDGED AND DECREED Plaintiff's Complaint is dismissed.

Dated this 27th day of April 1993.

/s/ Paul Benson
PAUL BENSON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT